No._____(Capital Case)

In the
Supreme Court of the United States

EX PARTE JOHN WILLIAM KING,
Petitioner.

On Petition for Writ of Certiorari to the
Texas Court of Criminal Appeals

APPENDICES

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APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-49,391-03

EX PARTE JOHN WILLIAM KING, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. 8869C IN THE 1ST JUDICIAL DISTRICT COURT JASPER COUNTY

Per curiam. YEARY, J., filed a concurring opinion. NEWELL, J., filed a concurring opinion. KEASLER, J., filed a dissenting opinion in which HERVEY, RICHARDSON, and WALKER, JJ., joined.

ORDER

We have before us a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5 and a motion to stay applicant's execution.[1]

In February 1999, a jury found applicant guilty of the June 1998 capital murder of

[1] Unless otherwise indicated, all future references to Articles are to the Texas Code of Criminal Procedure.

James Byrd, Jr. The jury answered the special issues submitted pursuant to Article 37.071, and the trial court, accordingly, set applicant's punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *King v. State*, 29 S.W.3d 556 (Tex. Crim. App. 2000).

In his initial application for a writ of habeas corpus, applicant raised five claims in which he asserted that his counsel performed deficiently. This Court denied applicant relief. *Ex parte King*, No. WR-49,391-01 (Tex. Crim. App. June 20, 2001) (not designated for publication).

Applicant filed a subsequent habeas application (our -02) in the trial court on June 22, 2006. In this application, applicant raised twenty-one claims, including a claim that his trial counsel performed deficiently by failing to present a viable defense showing applicant's innocence and a claim that applicant's rights were violated when the trial court denied his request for different counsel and denied his counsel's motion to withdraw. This Court determined that all of the claims raised in the application failed to meet the requirements of Article 11.071 § 5, and it dismissed the application. *Ex parte King*, No. WR-49,391-02 (Tex. Crim. App. Sept. 12, 2012) (not designated for publication).

On April 10, 2019, applicant filed in the trial court the instant habeas application in which he raises a single claim. Specifically, he asserts that his defense counsel "improperly overrode [his] Sixth Amendment right to present an innocence defense,

resulting in structural error that requires a new trial."

Applicant has failed to meet the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of the claim raised. Art. 11.071 § 5(c). Applicant's motion to stay his execution is denied.

IT IS SO ORDERED THIS THE 22nd DAY OF APRIL, 2019.

Do not publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-49,391-03

EX PARTE JOHN WILLIAM KING, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. 8869C IN THE 1ST JUDICIAL DISTRICT COURT JASPER COUNTY

YEARY, J., filed a concurring opinion.

CONCURRING OPINION

In this eleventh-hour subsequent application for writ of habeas corpus in a capital case, Applicant invokes the opinion of the United States Supreme Court in *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018), which was decided almost a year ago. He contends that he has satisfied the gateway criteria of Section 5(a)(1) of Article 11.071 of the Code of Criminal Procedure because *McCoy* constitutes new law that was unavailable to him at the time he filed his initial writ application in 2001. *See* TEX. CODE CRIM. PROC. art. 11.071 § 5(a)(1) (courts may not consider the merits of a claim raised for the first time in a subsequent

capital writ application unless it contains specific facts to show that it relies upon, among other things, a legal basis that was unavailable for use in previous applications).

McCoy either constitutes new law for purposes of Section 5(a)(1) of Article 11.071, or it does not. If it is not new law, it cannot serve to excuse Applicant's failure to raise the issue in prior writ applications. But if it is new law, Applicant must still satisfy the Court that the new law it represents applies retroactively to afford him relief in a post-conviction context. *See Ex parte Lave*, 257 S.W.3d 235, 237 (Tex. Crim. App. 2008) (following *Teague v. Lane*, 489 U.S. 288 (1989) as a matter of state habeas practice to hold that the Sixth Amendment holding of *Crawford v. Washington*, 541 U.S. 36 (2004) will not be applied retroactively to cases that were already final when it was announced). However, Applicant does not even acknowledge that retroactivity is an issue, much less does he make any argument why *McCoy* ought to be given retroactive application. For that reason, if no other, he has failed to allege that the new law meets the *Teague* criteria, and that he may therefore rely upon it for relief in a collateral attack.

Nor am I inclined to believe that either the United States Supreme Court or this Court would actually hold that *McCoy* should apply to cases that were already final when *McCoy* was decided.[1] *See Chaidez v. United States*, 568 U.S. 342 (2013) (holding that the opinion in *Padilla v. Kentucky*, 559 U.S. 356 (2010) rendered a "new" rule of constitutional law for *Teague* purposes, and declaring that, because Chaidez did not argue that either of the *Teague*

[1] This Court issued its mandate in Applicant's direct appeal on November 13, 2000. There was no petition for certiorari to the United States Supreme Court.

exceptions applied, he could not rely upon it in a collateral attack); *Ex parte Maxwell*, 424 S.W.3d 66, 71 (Tex. Crim. App. 2014) (holding that, in determining questions of the retroactivity of new constitutional rules to final state convictions, this Court will "follow *Teague* as a general matter of state habeas practice"). It seems to me that *McCoy*'s rule, assuming it is new, is neither "substantive" nor "a 'watershed' rule of criminal procedure" in contemplation of *Teague*. *See Maxwell*, 424 S.W.3d at 70–71 (explaining the Supreme Court's narrow implementation of the exceptions to the *Teague* prohibition against the retroactive application of "new" rules of constitutional law).[2]

In any event, like Chaidez, Applicant makes no argument that an exception applies. *See Chaidez*, 568 U.S. at 347 n.3 (noting that Chaidez argued none of the *Teague* exceptions, and therefore regarding the exceptions as not "relevant" to the case). Had Applicant thought he had a strong enough argument that a *Teague* exception should apply, he has had plenty of time since *McCoy* was decided to present that argument to us. We should not grant him a stay of execution in order to address an indispensable issue that, even at this eleventh hour, he has not acknowledged.

I therefore join the Court's per curiam order dismissing Applicant's latest subsequent

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[2] Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose." *Montgomery v. Louisiana*, 136 S. Ct. 718, 729 (2016). As for "watershed" rules of criminal procedure, "[t]his class of rules is extremely narrow and 'it is unlikely that "any . . . has yet to emerge."'" *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004) (quoting *Tyler v. Cain*, 533 U.S. 656, 667 n.7 (2001), which in turn quotes *Sawyer v. Smith*, 497 U.S. 227, 243 (1990)). *See also Maxwell*, 424 S.W.3d at 70 ("[I]t is unlikely that any more new [watershed] rules will emerge.").

application for writ of habeas corpus and denying his motion to stay the execution.

FILED: April 22, 2019
PUBLISH

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-49,391-03

EX PARTE JOHN WILLIAM KING, Applicant

ON APPLICATION FOR A WRIT OF HABEAS CORPUS
AND MOTION FOR STAY OF EXECUTION
IN CAUSE NO. 8869C IN THE 1ST JUDICIAL DISTRICT COURT
JASPER COUNTY

NEWELL, J. filed a concurring opinion.

Even if we were to assume without deciding that *McCoy v. Louisiana*[1] amounts to new law that overcomes the statutory bar against subsequent writs, this case is factually distinguishable from *McCoy*. Unlike in *McCoy*, the record here does not demonstrate that Applicant's attorneys conceded guilt at trial. Further, the record does not demonstrate that Applicant maintained his innocence consistently as

[1] 138 S. Ct. 1500 (2018).

McCoy did. For me, it is enough to simply say that the unique circumstances present in *McCoy* are not present in this case; Applicant has not made a prima facie case for relief under the so-called "new" law.

This is evident in the Fifth Circuit's case denying federal habeas relief in which Applicant litigated a similar claim. In *King v. Davis*, Applicant argued broadly that his trial counsel was constitutionally ineffective for failing to adequately present the case for King's innocence during trial.[2] As part of that claim, Applicant pointed to the same decisions and actions of trial counsel that he points to in this writ. Noting that counsel faced an uphill battle from the start, the Fifth Circuit held that counsel acted reasonably and maximized King's chances of acquittal.[3] The United States Supreme Court denied certiorari regarding that decision after having decided *McCoy*.[4]

Now, Applicant re-casts his claim as "trial counsel overrode his Sixth Amendment right to present an innocence defense." Putting aside how this may stretch the holding of *McCoy*, I see very little difference between Applicant's claims in federal court and the ones made here despite

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[2] 883 F.3d 577, 581 (5th Cir. 2018).

[3] *Id.* at 586.

[4] 139 S. Ct. 413 (2018).

Applicant's attempt at re-branding. If the United States Supreme Court was not interested in Applicant's previous federal claims, it seems unlikely the Court will be interested in Applicant's claims here. Of course, that Court's refusal to grant review is not generally indicative of anything, approval or disapproval, of a lower court's opinion. Nevertheless, I would leave it to the higher court to address that possible inconsistency in this case rather than wait years for clarification.

With these thoughts, I concur.

Filed: April 22, 2019

Publish

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-49,391-03

EX PARTE JOHN WILLIAM KING, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. 8869C IN THE 1ST JUDICIAL DISTRICT COURT DALLAS COUNTY

KEASLER, J., filed a dissenting opinion, in which HERVEY, RICHARDSON, and WALKER, JJ., joined.

DISSENTING OPINION

I don't know what the outcome of this case would have been had we granted King's motion for stay of execution and taken more time to consider his claims. It may very well be, as Judge Yeary contends, that after carefully considering the arguments presented by both sides, we would come to the conclusion that the Supreme Court's holding in *McCoy v. Louisiana*[1] does not afford relief to those whose convictions were already final when that case was decided. It may very well be, as Judge Newell argues, that King's claim will

[1] 138 S. Ct. 1500 (2018).

ultimately fail on its merits, irrespective of its procedural availability (or unavailability) at this hour.

What I do know is this: A death-sentenced man who has asserted his innocence since his capital-murder trial has asked us to review his claim that his trial lawyer overrode his express wishes to pursue a defense consistent with his innocence. In light of this Court's recent earnest, but ultimately unsuccessful, attempts to implement new Supreme Court precedent in death-penalty cases,[2] and especially in light of the horrible stain this Court's reputation would suffer if King's claims of innocence are one day vindicated (or, perhaps, if the Supreme Court eventually decides that *McCoy* should apply retroactively), I think we ought to take our time and decide this issue unhurriedly. I would grant the stay.

What harm do we risk by taking that course? If King's claims lack merit, then the justice he so richly deserves will only have been delayed. If, on the off chance, his claims are meritorious, the Court's decision today will have paved the way for an injustice that can never be undone. A few months' delay seems a small price to pay to avoid that horrifying possibility—even if it is but a slight possibility.

Respectfully, I dissent.

Filed: April 22, 2019

Publish

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[2] *See Moore v. Texas*, 139 S. Ct. 666 (2019).

APPENDIX B

I had made arrangements to talk to his dad this afternoon and was going to go by the jail later this evening.

It makes it extremely difficult for us to prepare. We're prepared to talk to some witnesses, and I gave him the witness list the other day and an evidence list. But if he doesn't want to talk to me, we're going to have to do it anyway. It might just be to protect the Record and protect him and on an appeal even. We're asking the Court at this time to allow us to withdraw, the Court to grant a continuance and appoint him another attorney. I think that's what he wants to do.

As far as being ready for trial, we'll be ready as the Court has ordered; and we're working forward for that diligently right now.

THE COURT: Do you want me to hear from your client?

MR. CRIBBS: If he desires to testify. Do you want to say anything?

THE DEFENDANT: Your Honor, I've already written numerous letters explaining the situation.

THE COURT: I've gotten two of them. Have

you written more than two?

THE DEFENDANT: Yes, sir, I've written one prior to those two up in the Livingston Unit.

THE COURT: I haven't gotten but two.

THE DEFENDANT: They all said the same thing.

THE COURT: Were they photocopies of each other? The two that I have are identical.

THE DEFENDANT: Yes, sir, they were all the same letter, mailed at different times.

THE COURT: Anything else?

MR. CRIBBS: No, sir, we have nothing else.

MR. GRAY: Your Honor, I'm ready to go to trial. I haven't seen any evidence or any grounds that would appear to justify an attorney withdrawing.

THE COURT: Anything else, Mr. Cribbs?

MR. CRIBBS: No, sir. I'd like to ask if when I leave here, we're going to go over there and talk to him today. Do you want to talk today? I've got some things I need to talk to you bad, if you want to talk to me. If you don't, I won't take the time to go over.

THE DEFENDANT: Yeah.

MR. CRIBBS: I'll leave and go over there

and talk to him; but I have nothing else to say on my motion, other than to protect the Record.

THE COURT: The motion to withdraw is denied. I'm going to deny your motion to withdraw.

MR. CRIBBS: All right, sir.

THE COURT: All right. You go somewhere and do the gag order you're talking about.

MR. CRIBBS: Yes, sir.

THE COURT: So we'll know what we're protecting.

MR. HARDY: Judge, just for the Record, there's nothing granted at this time; is that correct?

THE COURT: Well, I granted an oral motion. Nothing is effective until we get something in writing, and we're going to have something in writing in about 15 minutes. Let's everybody wait 15 minutes.

MR. HARDY: We'd just like something so we can respond.

THE COURT: Is that some of the press sitting out there now?

MR. GRAY: Yes, sir.

THE COURT: Can you wait 15 minutes?

APPENDIX C

[redacted]

FILED

99 JAN 13 PM 3:39

LINDA RYALL
DISTRICT CLERK
JASPER COUNTY, TEXAS
BY _____ DEPUTY

Judge Joe Bob Golden
Cause No. 8838
Jasper County Courthouse
Jasper, TX 75951

Your Honor:

I am writing in regards to the council appointed to my defense in this cause. I am dissatisfied with Mr. C. Haden "Sonny" Cribbs representation of me to date. Mr. Cribbs has proved to be negligent in his efforts to provide me with requested information and an adequate update on my case. Mr. Cribbs is in disagreement of my innocence, and on several occasions, has acknowledged that he plans to do no more in my defense than try and ensure that I do not receive the death sentence. This conflict of differences has caused me anxiety and suspicions about Mr. Cribbs...

Due to Mr. Cribbs insufficient representation of me throughout this case, I respectfully request that C. Haden "Sonny" Cribbs be removed as my lawyer and a new lawyer be appointed to my defense...

Thank you for your time Judge Golden, and any help in this matter would be greatly appreciated...

Respectfully Submitted
John W. King 100
John W. King

Nov. 23, 1998

Judge Joe Bob Golden
Cause No. 8869
Jasper County Courthouse
Jasper, Tx 75951

Your Honor:

I am writing in regaurds to the legal council appointed to represent me in this cause. I am dissatisfied with Mr. C. Haden "Sonny" Cribbs' representation of me to date. Mr. Cribbs has been negligent in his efforts to provide me with requested information and an adequate update in this cause. Mr. Cribbs is in disagreement of my innocence, and on several occasions, has stated that he intends to do no more for my defense than try and ensure that I do no receive the death sentence. This conflict of differences has caused me anxiety and suspicions about Mr. Cribbs...

Due to Mr. Cribbs insufficent representation of me, I respectfully request that C. Haden "Sonny" Cribbs be removed as my lawyer and that a new lawyer be appointed to my defense...

Thank you for your time Judge Golden...

Respectfully Submitted
John W. King

APPENDIX D

in the witness box.

Ladies and gentlemen, Mr. Cribbs, I'm not going to take a whole lot of your time; but Mr. Cribbs and I also want to thank you for your time and your attention in this case. We've been here some two weeks; and I know these, some of the evidence has been hard to look at. I'm going to concentrate on a specific area and that is the kidnapping area and Mr. Cribbs is going to follow-up with his final comments.

I'd like to go over a few things in the Charge with you that we discussed as we each voir dired you, but I think it's clear to the jury that a capital murder is the intentional killing of an individual while in the commission of another felony. In this case, as we talked about, is kidnapping. And basically kidnapping -- and it's here for you to read. If I misstate it, they're certainly going to let me know that. Basically, kidnapping is an abduction; and you can abduct by restraint and by several other defined methods that the Judge has explained to you on the second page.

And again, the Charge points out what I say, what the District Attorneys say, what the

Federal Prosecutors say, if they argue, is not evidence. All that evidence came from right here. I talked about that lighthouse that's -- now y'all are going to evaluate what light has come from here and how you interpret that light.

There are a couple of definitions that you're going to need to review on the kidnapping, and I know you're going to look at them and look at them closely before you make your decisions. But basically the Judge has defined what abduction is for you, what deadly force is, serious bodily injury, and what restraint is. I'd also like to point out that he has defined this extraneous offense situation. Extraneous offense, he basically says you're to use only to determine motive, intent, scheme, and design with regard to making a determination in this case as to the verdict.

I'd like to take -- and I'm sure Mr. Gray is going to follow-up on this because he's in effect told us. I've been involved in this case for some five months. Mr. Cribbs and I have gone over this evidence, at least what we had; and so you'll understand, when we hesitated over there and asked for a witness' statement, we did

not have that statement. We weren't trying to pull some kind of Perry Mason situation. The Government provided us initially about 4400 documents for discovery. We did have the pathologist, we did have Dr. Baechtel's reports, and we did have some photographs; but in terms of some of the these lay witnesses, we are not -- and it is the law. There's nothing improper about it. It's just that we had to read those statements. We were only entitled to those statements once this witness testified. Then we can see what they say. We didn't want you to think there was anything peculiar about that.

I'd like to go into the way we see the kidnapping. During that five months, Mr. Cribbs and I have gone over and over how we thought the evidence would come out with regard to the kidnapping and basically where was the abduction. We know that at about 1:30, 1:45, through Mr. Mahathay, I believe his name was, that Mr. Byrd was at a party and that Mr. Byrd left walking. Now, what I'm going to talk to you about initially is what I call direct somebody saw evidence. Mr. Mahathay said he

left. Mr. Mahathay, had he been drinking? Well, no, he wasn't drunk; and there wasn't any problem with that. But approximately 30 minutes later on Martin Luther King Drive, Steven Scott, the 18 year old young man, Mr. Byrd miraculously is staggering and he is so intoxicated that Mr. Scott does not pick him up, but does see him about in the area of 2:30 get in the back of a pickup with his back to the cab.

So, we know at that point we're still in the voluntary, no-restraint area. The only other direct evidence you have, and you'll weigh that as you desire, is the quote "logical reasoning letter" to the Dallas Morning News by the defendant. In that letter he basically says at one point the deceased was in the pickup. Now, that's a fact that you the jury are going to have to decide if Mr. Byrd ever got in the pickup, if that's a relevant fact to you. It seems to be to us. So, we've got really only three witnesses with regard, as we see it, with regard to the restraint. Yes, I'll agree we've got some opinions; we've got some conclusions by police officers. We've got a button. We've got an area that they term "scuffle scene." They're

going to try to indicate, I think, that either the scuffle scene -- Mr. Hardy has said hit in the back of the head. Ladies and gentlemen, I didn't hear that in the evidence. If you did, that's fine; but I didn't hear anybody say Mr. Byrd was hit in the back of the head. But that's something that you've got to weigh. We know at a point there was a terrible, terrible, brutal, horrendous, painful death, absolutely no question. The question is was Mr. Byrd kidnapped?

I think their theory that they will end up arguing to you is the dragging, or what Mr. Cribbs and I think is that the dragging behind the vehicle was the abduction and the kidnapping. We have always felt that was the method of death, and I'd like to give you a couple of examples. If we're wrestling around on the ground -- let's just say two people are wrestling, having a fight. They fall to the ground, and the one that's losing tries to get off and you grab and hold him back. Is that an assault or is that a kidnapping? I give you these examples so that when you go back there you can think about what we're saying about the

kidnapping.

Second situation could be one person walks up to another and says, stop, put up your hands, I'm going to kill you, bang. Is that a kidnapping, or is that a murder? Not too different from the facts you have here. The last situation or example I'd like to give you may stretch a little bit, but I think it kind of fits the facts. We've got the same fight rolling around on the ground situation, and one party has a knife and slowly, horrendously during the fight, intentionally, doesn't kill him, but keeps knifing him; and at a point that person dies. Is that a murder or is that a kidnapping?

So, again, I think the State's theory on the kidnapping is that the tying with whatever he was tied with, chain or otherwise, obviously something was tied to Mr. Byrd's feet. That at that point the abduction occurred, but we feel like that is the method of death. That's what -- the pathologist said he died going down that road; at a point he was dead. At a point, obviously, he was conscious, according to the pathologist.

So, again, the tying of the feet and the dragging, the way we see the case, is that is the intentional killing and not a kidnapping. Let me just -- I'm going to be real brief. We had the exhibit that we showed you -- Your Honor, I don't mean to block your view -- on beyond a reasonable doubt. This is typed in the Charge. It's a doubt based on common sense. You certainly don't leave -- the State will tell you too -- you don't leave your common sense out here in the courtroom when you go back there and do your deliberations.

It's a kind of doubt that would make a reasonable person hesitate. Would you hesitate under the examples I gave you compared with the evidence on the kidnapping? Would you hesitate to act in the most important of your own affairs because of that? Proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your affairs. I think you're entitled to look at those examples I gave you and decide was that an assault or was it a kidnapping. Was that a fight, a killing, or a kidnapping? And in connection with that, the

Judge has told you what beyond a reasonable doubt is. I'm going to tell you what it's not; and this chart reflects it. It goes all the way down from I don't believe, he's not guilty, all the way up to guilt, strongly believed.

Some of you may be sitting there and say, well, possibly guilty. If you think any of these items from believed, believed not guilty, highly unlikely, less than likely, probably not, unlikely, moving on up to suspected, possibly guilty, probably guilty, guilt likely, or guilt strongly believed, ladies and gentlemen, they have not proved kidnapping. They have got to elevate that and go up to this level with the definition that the Court has given.

We say that the tattoo evidence doesn't prove kidnapping. Mr. King's writings do not prove kidnapping. The infamous K. K. K. book, hardbound book from the Jasper High School Library does not prove kidnapping. Don't find this young -- don't find that the element of kidnapping occurred based on this young man's racial beliefs, which he obviously has. Don't find the elements of kidnapping because of what he believes or what happened to him in the

penitentiary. Find it only based on evidence, based on beyond a reasonable doubt; and please remember you can strongly believe a kidnapping occurred or you can believe he's not guilty of the kidnapping, and that isn't enough.

You've got to be somewhere up to the red area, ladies and gentlemen, on the kidnapping issue. And, again, I think I'm very plain with what I'm saying; but we would say that the method that we think they're going to argue, and we have felt this now for five months, on prove of the kidnapping because we only have Mr. Byrd voluntarily getting into that pickup. And you can look at their exhibit if you want to with the red dots on it of Jasper. Looks to me like there's only about two blocks difference going out where this thing happened. If he's in the back -- if Mr. Byrd -- if it's involuntary at that point, they go right by the Sheriff's Department, the Cole Correctional System here in Jasper. Could have jumped out of the truck. So, at some point, no question his feet were tied. I didn't hear any evidence that he was hit in the back of the head.

So, all the evidence on kidnapping is going

to be -- have to be what you think happened out there. We don't think a kidnapping occurred. There is no question that a terrible murder occurred in a terrible, terrible manner. Brutal, painful, we heard all that and knew all that. Even was asked by the press have you seen the photographs? Certainly, I had seen the photographs. I've seen about 300 more than you have. The murder and the kidnapping are two separate issues that you've got to reach, and we ask you to consider that. And I'll relinquish the rest of my time to Mr. Cribbs, and I thank you.

THE COURT: Mr. Cribbs.

MR. CRIBBS: May it please the Court. Ladies and gentlemen of the jury, this is not an easy thing to stand up in front of you and talk today. We've been here for about -- if you'll excuse me, I'm going to walk. I get a little nervous, and I think a little better walking and talking. We've been here about, oh, we've been here an hour and another hour on the witness stand approximately; and now you've been here for five days. You've heard a tremendous amount of evidence that's been fed to you by both us

gloves. That means you don't know what the hazardous material may or may not be. You have that right. Then when you finish listening to our arguments and our suggestions, if you will, and you examine the evidence, you're going to reach a verdict.

For those of you that haven't studied the Penal Code or been on a jury before, this is the Court's Charge. This is simply what the Court gives you, the law applicable to this case. And they make an application issue in here; and that's simply do you find that these things happened as alleged in the indictment, then you will find a person guilty of the indictment as alleged. And that would be capital murder.

The other alternative, if there is a doubt in your mind or reasonable doubt in your mind that it is no proof to you beyond a reasonable doubt that there is a kidnapping, then the law requires you to find him not guilty of capital murder, and then you can proceed with the issue of murder. If that's not proven to you beyond a reasonable doubt, and Mr. Jones went over that information. It's also in here. So, I'm not going to go over it again. Read it because it's

hole, and Bill knew, and all the other kids that played in the neighborhood. We played paint ball and have for years, and that's where the chain was found. That doesn't mean that that chain has one bit of evidence other than it was put in as a chain. It was found, and there's no evidence that it was used.

There is some evidence that there was some people -- or I'd say a car or a truck at the scene. We've got a cigarette lighter, and if I recall the evidence at the apartment was that that lighter had been returned or lost and returned to Russell Brewer. That's what I remember, and then maybe Bill got it. I don't remember the evidence, and I may be forgetting it. I'm sorry. That lighter was found at the scene on Huff Creek Road, and it says "Possum" on it. And it has the Ku-Klux Klan sign on it. Absolutely no denying it. Take the lighter in there if you want to. And we've got a cigarette butt on the road. The one cigarette butt that tends to tie John William King to this offense is a cigarette butt that I remember Mr. Gray saying is that one that somebody else took a drag off?

way off here on tattoos, you may be away from the issue; and that is, has the State proved beyond a reasonable doubt that John William King committed the offense of capital murder? Did he intentionally kill James Byrd, Jr. while committing the offense of kidnapping or intentionally or attempting to commit kidnapping? If they fail to prove that element, and that is an element, then you must find him not guilty.

If find him not guilty of capital murder, the alternative then comes to the lesser included offense. They've still got to prove that to you beyond a reasonable doubt by the law of parties or you must be found guilty of nothing. The law will require him to be found not guilty, and that's going to be one onerous task that you're going to have to do. But that's what you took on with this responsibility. I know some of you might have wanted to be on a jury. A lot of you, I'm sure, didn't want to be here; and I thank you for doing your civic duty. But you've also got to do your civic duty one more time, if you feel it's justified. That is, you must return a

verdict of not guilty, if it's not proven beyond a reasonable doubt.

Pat did say one other thing that a lot of people went to Vietnam and came back. You had a bunch of traumatic incidents happen -- or to war. He didn't say Vietnam. I remember something called post-traumatic stress syndrome. Everybody doesn't come back the same. People that endure such traumatic stress they never come back right; and I think it's unquestionable, absolutely without any evidence other than one thing, this boy had something happen to him in the penitentiary. He became a racist, he became a hater; but the bad part about it, that's his right and that's really what we did.

The penitentiary created him. If that's what he was because he was a normal kid from Jasper until then. Maybe he can't. Maybe he does, and can't put that aside. But you know that doesn't really make any difference. The only thing we're talking about is whether John William King killed James Byrd, Jr. in the commission or attempted commission of kidnapping. And we haven't heard very much

evidence about kidnapping. We've heard a lot of evidence about the way Mr. King died, and it is absolutely unimaginable to die like that. But the cause of death doesn't make it a capital murder, period.

Death is a death and murder, if you look at this Charge, is intentional -- knowingly intentionally taking a human life. And if you feel that that's done and you feel that the State of Texas hasn't proven beyond a reasonable doubt, the offense of capital murder, as required by proving additional element of kidnapping beyond a reasonable doubt or attempted, then you must find him guilty of murder.

Again, I don't think the State of Texas has proven this beyond a reasonable doubt. You're not supposed to judge a man solely based upon his appearance, but rather on his behavior; and what has the State of Texas proven other than his belief, his appearance? And they have failed to prove his behavior. Thank you, thank you very much.

THE COURT: Mr. Gray.

MR. GRAY: Your Honor, ladies and

APPENDIX E

Judith Lee Hancock was called as a witness, and having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GRAY:

Q State your full name into the Record, please, and spell your last name.

THE COURT: Hold on just a second and let's let everybody get seated.

Okay.

A My name is Judith Lee Freeland Hancock.

Q (By Mr. Gray) Spell your last name, please.

A H-a-n-c-o-c-k.

Q And how are you employed?

A I'm a reporter with the DALLAS MORNING NEWS.

Q Have you been covering this story for a long period of time?

A Yes.

Q Did you receive a communication from the defendant, Bill King?

A I did.

Q Would you examine what's been marked as State's Exhibit 105; and first, I'll ask you if you can identify that.

A Yes, I can.

Q What is that?

A It is a letter dated November 12th, 1998, and an accompanying statement, typewritten statement, titled "Logical Reasoning" from Mr. King.

Q When did you receive that?

A I received that -- it was postmarked November 14th; and I believe I received it two days after that, sometime around the 16th of November.

Q Is there -- also is it accompanied by the envelope that it came in?

A Yes, it is.

Q And how is it signed?

A It is signed -- it's DALLAS MORNING NEWS envelope that is signed John William King.

Q How is the letter signed?

A The letter is signed -- just one second -- John W. King.

Q All right.

MR. GRAY: Your Honor, I'd tender State's Exhibit 105 into the Record.

MR. JONES: No objection, Your Honor.

THE COURT: 105 is received.

(State's Exhibit No. 105 was admitted into evidence.)

MR. GRAY: I'd like to request permission of reading portions of that before the jury.

THE COURT: All right.

MR. STEVENS: If it may please the Court. The second full paragraph of Page 3: (Reading) Given a description as to the whereabouts of the dirt trail where an alleged beating of the deceased occurred, it's essential to acknowledge the fact that Shawn Berry co-inherited a small tract of land adjacent to the tram road, which he visited quite frequently.

Therefore, the fact that my cigarette lighter with 'Possum' inscribed upon it was found near the scene of the crime, along with other items -- i.e., several hand tools with 'Berry' inscribed on them, a compact disk belonging to Shawn Berry's brother Lewis, and my girlfriend's watch, as well as items of the deceased -- are all verified facts implementing that these items could have fallen from Shawn Berry's truck during a potential struggle with the deceased while on the tram road.

However, unacknowledged facts remain, that I, along with Russell Brewer and Lewis Berry, had been borrowing Shawn Berry's truck to commute to and from an out-of-town land clearing job each day. My girlfriend's watch was kept in

Shawn Berry's truck for us to keep track of the time. Lewis Berry had brought along several of his C.D.s for our listening pleasure during our hourly drive each morning and evening, which he had a tendency to leave in his brother's truck.

Furthermore, the aforementioned cigarette lighter had been misplaced a week or so prior to these fraudulent charges that have been brought against Russell Brewer and me. This, so forth, does not prove the presence of my girlfriend, Lewis Berry, Russell Brewer, nor myself at the scene of the crime, verifiably only the owners of the property in question.

Picking up on the third full paragraph of Page 5: (reading) Several statements and the theories against Shawn Berry, Russell Brewer, and myself, John W. King, for a prospective motive in this hard crime have been presented to the public. Against the wishes of my attorney, I shall share with you objective facts and my account of what happened during the early morning hours of June 7th, 1998.

After a couple of hours drinking beer and riding up and down rural roads adjacent to Highway 255 off Highway 63, looking for a

female's home, who were expecting Shawn Berry and Russell Brewer, Berry, though frivolous anger and fun at first, begun to run over area residents' mail boxes and stop signs with his truck due to negligence in locating the girl's residence.

Becoming irate with our continued failure to locate the female's house, Shawn Berry's behavior quickly became ballistic as he sped through area residents' yards in a circular manner and made a racket with his truck's tailpipes managing to sling our ice chest from the back of his truck several times.

During his little conniption fit, Shawn Berry then stopped just ahead of a mailbox on Highway 255, took a chain from the back of his truck, wrapped it around the post of the mailbox, and proceeded to uproot and drag the mailbox east on Highway 255, stopping yards short of the Highway 63 north intersection, where he then removed his chain, replaced it, and continued to drive to a local convenience store, Rayburn Superette, to try and call the female who was expecting him and Brewer.

Fortunately no one answered at the girl's

house and after repeated requests from me, as well as complaints from Russell Brewer, of a throbbing toe he injured during a recovery of our ice chest, Shawn Berry then agreed to take us to my apartment.

Shawn Allen Berry, driving with a suspended license and intoxicated, while taking Russell Brewer and me home those early morning hours, decided to stop by a mutual friend of ours home located on McQueen Street to inquire as to what the residents and his brother Lewis Berry were doing. On our way there, we passed a black man walking east on Martin Luther King Drive, whom Shawn Berry recognized and identified as simply Byrd, a man he befriended while incarcerated in the Jasper County Jail and, Berry stated, supplied him with steroids.

Shawn Berry then proceeded to stop his truck approximately 10 yards ahead of this individual walking in our direction, exit his vehicle, and approach the man. After several minutes of conversation, Shawn Berry returned to the truck and said his friend was going to join us because Berry and Byrd had business to discuss later and, thus, Byrd climbed into the

back of Shawn Berry's truck and seated himself directly behind the cab.

While continuing on to our friend's residence where supposedly Lewis Berry was to be, we noticed there were neither lights on nor signs of activity in the trailer as we approached. We decided to proceed on to my apartment; but contrary to Russell Brewer's and my request, Shawn Berry drove to and stopped at another local convenience store, B.J.'s Grocery, just east of the Jasper city limits. Shawn Berry then asked Russell Brewer if he could borrow 50 to $60 because he needed a little extra cash to replenish his juice, steroid supply.

After Brewer gave Shawn Berry the remainder of what money he had to return to Sulphur Springs, Texas, on, Berry asked if Russell Brewer and I could ride in the back of the truck and let his friend sit up front to discuss the purchase and payment of more steroids for Shawn Berry. Russell Brewer and I obliged on the condition Berry take us to my apartment without further delay, which, after a brief exchange of positions, he did.

Once we arrived at my apartment, Shawn Berry informed Russell Brewer and me that he was leaving so that he could take Byrd to get the steroids and then home. I asked if Brewer or I would bring a small cooler of beer down for him and his friend along with a bottle of bourbon Berry had bought a few days prior.

Russell Brewer and I went up to my apartment and began to fill a small cooler with approximately six to eight beers. Realizing I left my wallet and cigarettes in Shawn Berry's truck, I opted to bring the cooler back down to Berry. After retrieving my wallet, but unable to locate my cigarettes, I then returned upstairs to my apartment, into my bedroom, and proceeded to call my -- an ex-girlfriend before retiring to bed in the predawn hours of June 7th, 1998.

Q (By Mr. Gray) Did he read that accurately?

A Yes, sir, I believe so.

MR. GRAY: Pass the witness, Your Honor.

C R O S S - E X A M I N A T I O N

BY MR. CRIBBS:

Q You said that letter -- that letter, was it signed by Bill King or just a typed --

A I'm sorry?
Q Was the letter signed by John W. King?
A Are you talking about the handwritten letter or the typed statement?
Q No, the typing they just read.
A It was not.
Q So, that statement was not signed by anybody?
A No, sir.
Q And you received it -- have you ever had an interview or talked to Mr. King personally?
A No, sir, I have not.
Q So, this is merely a writing you received -- where did it come from? Do you remember, Lee?
A The writing?
Q Where was it mailed from? Do you remember?
A I believe the postmark -- I believe the return address was a state prison unit in Livingston, Texas. I'd have to look at the postmark to tell you.
Q It was mailed to you from a jail or some unit?
A Some prison, yes.

MR. CRIBBS: We have no other questions, Your Honor.

MR. GRAY: No questions.

THE COURT: You may come down. Thank you,